



Panel V

Commentary—The Road Ahead

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Our discussions have revealed again the extent to which this situation has confronted us with complex new questions and challenges from an international legal perspective. We must respond to them with joint efforts, with determination and solidarity but in doing so we must keep our heads.

The answers we are looking for in the legal field will be decisive for the future guidelines on countering international terrorism. And we should be well aware of the fact that the shape of these guidelines will be decisive for the effectiveness and stability of the long-term cooperation between the states forming the international coalition against terrorism.

The NATO Alliance as a consequence of the attacks of September 11th considered the attacks to be an act covered by Article 5 of the North Atlantic

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Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.² On that basis the European NATO Allies are providing substantial military contributions to combating terrorism.

Germany, for instance, has a third of its naval assets operating in the Gulf of Aden area in support of Operation ENDURING FREEDOM. In Afghanistan, German special operations forces are employed alongside US forces, fulfilling Germany's obligations under Security Council Resolution 1373 which requires that all states "take the necessary steps to prevent the commission of terrorist acts . . . (and to) ensure that any person who participates in the financing, planning, preparation and perpetration of terrorist acts or in supporting terrorist acts is brought to justice. . . ."³

The requirement for close cooperation among nations in fulfilling this political mandate, often with military means, calls for some creativity and innovative thinking in the legal arena as well. There seems to be consensus on at least one point, the longer the war on terrorism lasts, the more importance the aspect of acceptance of the use of these means will gain. In Europe recently, the discussion has been characterized by the aim to harmonize as far as possible the military need to prevent further terrorist acts with the legal need to preserve the standards of human rights and humanitarian law which have been well established over the last 50 years.

Regarding Operation ENDURING FREEDOM, there seems to be a clear understanding between all coalition partners that the inherent right of collective and individual self-defense as embodied in Article 51 of the UN Charter provides the authorization to take all necessary measures to accomplish the tasks set out in Security Council Resolutions 1368 and 1373. Accordingly, there is no doubt that military forces in the areas of operation are entitled to target persons suspected of perpetrating or supporting acts of international terrorism. Similarly, there is no doubt that military forces have the authority to seize and detain such personnel in order to bring them before the courts. On the

2. See North Atlantic Treaty, 4 April 1949, 34 U.N.T.S. 243, art. 5, available at <http://www.nato.int/docu/basic/txt/treaty.htm> (Oct. 29, 2002), which provides:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the U.N. Charter, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

3. See S. C. Res 1373, U.N. SCOR 56th Sess., U.N. Doc. S/1373/(2001).

other hand it is also clear from these two resolutions that self-defense is legitimate only when performed in accordance with the Charter, which tries to balance the protection of human rights against the aim of maintaining international peace and security. The crucial question then becomes, what does the Charter require?

The fight against international terrorism has to be fought on multiple fronts with multiple means. Three questions have been debated in Europe regarding the post September 11th behavior of nations. These questions are:

1. To what extent does humanitarian law, applicable in armed conflict, apply to detainees in the “War on Terrorism”?
2. To what extent does common human rights law apply?
3. What effect does the prohibition on the death penalty found in the European Convention on Human Rights have on US-European military cooperation within the coalition for Operation ENDURING FREEDOM (OEF)?⁴

I will discuss each of these questions briefly.

Regarding the first question, the UN High Commissioner for Human Rights, Mary Robinson, in her speech at the Commonwealth Institute in London on 6 June of this year stated:

There has been a tendency to ride roughshod over—or at least to set aside—established principles of international human rights and humanitarian law. There has been confusion about what is and what is not subject to the Geneva Conventions of 1949. There have been suggestions that the terrorist acts of 11 September and their aftermath in the conflict in Afghanistan demonstrated that the Geneva Conventions were out of date.

In that context the President of the ICRC, Jakob Kellenberger, has given an answer which appears as simple as it is to the point:

International humanitarian law is, quite distinctly, the body of rules that regulates the protection of persons and conduct of hostilities during an armed conflict. . . . Inasmuch as the fight against terrorism takes the form of armed conflict, the position is uncontroversial: international humanitarian law is applicable. Factually, if there exists an armed conflict, whatever the causes,

4. See Sixth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, art. 1, Apr. 28, 1983, Europ. T.S. No. 114, 32, available at <http://ccbh.ba/en/econv/protocol6.asp> (Oct. 29, 2002).

whatever the aim, whatever the name, it is regulated by international humanitarian law.⁵

While there is an ongoing international discussion as to whether the fighting in Afghanistan was or is an armed conflict, in my view there are good reasons for believing that an international armed conflict exists between the United States and its allies on the one hand and the Taliban as the de facto government of Afghanistan on the other. This view also seems to be shared by a number of US legal experts.⁶ If this is the case, the law of armed conflict started to apply no later than October 7, 2001, the day Operation ENDURING FREEDOM commenced.

Given that the law of armed conflict applied then in October 2001, Article 4 of the Third Geneva Convention would require that Taliban and Al Qaeda personnel integrated into the Taliban fighter force be treated as Prisoners of War (POWs). As POWs, these personnel could not be punished for the mere participation in hostilities in Afghanistan as they were privileged combatants. These individuals could, however, be held liable for violations of the law of armed conflict and for crimes unrelated to the hostilities. For these crimes, they would, of course, be subject to prosecution. This view seems to be shared throughout the European Union. By way of example, none other than Javier Solano, the European Union Foreign Policy Chief, called for the recognition by the United States of the right of the detainees held in Guantanamo Bay to be treated as prisoners of war. Mr. Solano further argued Article 5 tribunals should be held for those personnel whose status is uncertain.⁷

What does that mean for international cooperation in meeting the aims set by Security Council Resolution 1373, especially that of bringing terrorists to justice? Article 12 of the Third Geneva Convention stipulates that POWs may only be transferred to a power that is a party to the Convention and only after the detaining power has satisfied itself of the willingness and ability of the transferee power to apply the Convention.⁸ If it is agreed that the Geneva

5. Jakob Kellenberger, Address at the 26th Round Table in San Remo on Current Problems in International Humanitarian Law, "The two Additional Protocols to the Geneva Conventions: 25 years later – challenges and prospects." (Sep. 5, 2002), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList99/EFC5A1C8D8DD70B9C1256C36002EFC1E> (Oct. 30, 2002).

6. See, e.g., Curtis Bradley & Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249, 256 (2002); Robert Goldman, *Certain Legal Questions and Issues Raised by the September 11th Attacks*, 9 HUM. RTS. BR. 2 (2001).

7. See David Lee, *Al Qaeda Britons have no Complaints*, THE SCOTSMAN, Jan. 22, 2002.

8. See Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134, Art. 12 (1949).

Conventions apply to those personnel currently held in Guantanamo Bay, then Article 12 must be adhered to in the event of exchanges of detainees between coalition partners.

Certainly, however, not every person captured in Operation ENDURING FREEDOM is entitled to POW status. There might be al Qaeda members who have never participated in the fighting in Afghanistan but who have taken part in the preparation or perpetration of terrorist acts someplace else in the world. Those criminals cannot be POWs but should be granted the minimum standards of human rights which are non-abrogable for each person detained by a state authority. These non-abrogable minimum standards are quite similar both according to common human rights law and international humanitarian law of armed conflict. Protocol I to the Geneva Conventions provides a set of minimum standards in Article 75 for all persons in the power of a party to a conflict who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.⁹ Under the assumption that Article 75 of Protocol I codifies—more or less—customary law, this article could form the set of minimum rights to which each suspect is entitled. Accordingly, those detainees who are not entitled to POW recognition and protection, should be treated at a minimum in compliance with Article 75 of Protocol I.

Finally, I would like to address the European prohibition on the death penalty as established in the 6th Protocol to the European Convention on Human Rights.¹⁰ With its Resolution 1271 (2002), “Combating Terrorism and Respect for Human Rights,” on January 24, 2002, the Parliamentary Assembly of the Council of Europe called upon all Council member states “to refuse to extradite suspected terrorists to countries that continue to apply the death sentence . . . unless assurances are given that the death penalty will not be sought.” Similarly, section 8 of the German International Legal Assistance Act stipulates that the extradition of a person to a requesting state whose laws provide for the death penalty for the criminal offense committed is only acceptable if the requesting state guarantees that the death penalty will either not be imposed or enforced.

Clearly, significant differences exist among “War on Terrorism” coalition members with respect to the death penalty. Moreover, with the recent ratification of the Rome Statute and the subsequent creation of the International

9. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 40-41. Article 75 identifies certain acts that are prohibited regardless of the status of a conflict. Such prohibitions include murder, the taking of hostages, and torture, among others.

10. *Supra* note 3.

Criminal Court on 1 July 2002, different obligations with respect to rights standards may seriously affect the ability of coalition members to cooperate militarily in the “War on Terrorism.” This is particularly the case where personnel of a state bound by the Rome Statute are required to work with personnel of a state not a party to the Rome Statute, for these personnel will have less far-reaching human rights obligations than those personnel from the ratifying state.